

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DWAYNE MAU, JR.,

Defendant and Appellant.

C067198

(Super. Ct. No.
SF113131A)

Defendant Michael Mau, a member of the South Side Tracy subset of the Norteño street gang, was thrown out of a nightclub for fighting. Moments later, he fired a handgun through the door of the nightclub, killing one person and injuring six.

A jury convicted defendant of second degree murder, six counts of attempted murder, and shooting into an occupied building, all with enhancements for benefitting a gang and personal use of a firearm causing death or great bodily injury. Defendant was also convicted of various firearm offenses and

being an active gang participant. He was sentenced to 254 years and 8 months to life in prison.

On appeal, defendant does not challenge his convictions on the substantive offenses, but limits his contentions to issues involving the gang allegations. He contends there is insufficient evidence to support the gang enhancements, and also that he received ineffective assistance of counsel based on trial counsel's failure to object to the gang expert (1) offering an opinion on the ultimate fact or (2) recounting 29 incidents of defendant's contact with law enforcement.

Defendant also raises three sentencing errors--the People concede error on two. Defendant and the People agree that it was error to impose a 10-year gang enhancement on his murder count and on the charge of shooting at an occupied building. Defendant further contends the trial court erred in calculating his sentence on count VIII--shooting at an occupied building.

We shall modify defendant's sentence and otherwise affirm. As we will explain, sufficient evidence supports the gang enhancements and defendant did not receive ineffective assistance of counsel. We agree with the parties regarding the two sentencing errors and shall affirm the calculation of defendant's sentence on count VIII.

FACTS

Defendant and Others at the Shooting

Defendant is a member of the South Side Tracy Norteño criminal street gang. On the night of October 9, 2009, defendant gathered at a gang member's house with several

friends, including fellow gang members Mark Garcia and Johnny Martinez. Defendant lifted his shirt and showed Garcia the gun in his waistband. Defendant said, "I got something for somebody, they get crazy." Garcia interpreted this statement to mean, "If something happens, this is what's gonna protect us tonight." Unbeknownst to defendant, Garcia was working as a police informant.

After 10:00 p.m., defendant, Garcia, and Martinez went to Amore's, a restaurant that turned into a nightclub with a DJ after dinner. Amore's was the scene of the shooting.

There was a group at Amore's celebrating a birthday. That group included Naim Bey, who was killed in the shooting, Raul Barajas, who was shot in the ankle, and Diocelina Morales, who was shot in the buttocks.

Also at Amore's that night was a group associated with the city of Hayward.¹ This group included Jeffrey Manglona and Antonio Cabral. Although Manglona and Cabral were directly involved in the fight that preceded the shooting, no one in the Hayward group was injured in the shooting.

Several of defendant's friends and acquaintances were gathered at Amore's that night. Isaac Gonzalez arrived with Hector Virgen. Virgen was involved in the initial confrontation and Gonzalez was shot in his little finger. Carlos Santana was with his brother Alfred; they both knew defendant, Garcia and

¹ There was no evidence that the Hayward group was composed of gang members or rivals of the South Side Tracy Norteños.

Martinez. Carlos was shot in the leg.² Kenny Thomas, who knew defendant, came with Steven Castro. Thomas was shot in the ankle. Castro was shot in the thigh and suffered nerve damage as a result.

The Fights and the Shooting

A surveillance camera at Amore's showed defendant raising his shirt to show Thomas something. Although Thomas denied it was a gun, during the trial he told someone that it was a gun. Asked why he did not say anything, Thomas explained that he could not say anything because he knew "all these cats, they all know where I live." The camera also caught defendant talking to Garcia and making a hand gesture like a gun after Manglona walked by.

Upstairs at Amore's, Manglona and Virgen got into an argument and punched each other. Security broke up the fight.

The altercation restarted on the stairs and downstairs on the dance floor. Words were exchanged and punches were thrown. On one side, Manglona and Cabral, of the Hayward group, threw punches, some of which struck defendant. Several witnesses described at least one punch to defendant as a "sucker punch" or "cheap shot." Defendant, Garcia, and Martinez were all fighting.

² Because they share the same last name, we refer to Carlos and Alfred by their respective first names. After the shooting, Carlos called Garcia and told him, "Your fucking homie just shot me." Although he was a victim, Carlos initially refused to testify at trial, claiming not to remember anything. After he was appointed counsel, Carlos testified.

Security broke up the fight and escorted defendant, Garcia, and Martinez out the side door. As defendant was being ejected, he made a hand motion to the Hayward group to come out. Moments later, while outside, defendant pulled out a gun and fired multiple times through the door.

A nearby police officer heard the shots. The police arrived at a chaotic scene; people were screaming and running in all directions. There was blood "everywhere" inside Amore's. Bey was unresponsive on the floor with a fatal gunshot wound to his head. The police found more victims. There were bullet holes in the door and casings from a nine-millimeter handgun in the parking lot.

Garcia called his handler, Detective Ramirez, and told him about the shooting. Ramirez instructed Garcia to find the gun. Later, Garcia called the police and told them that defendant was in a motel in Manteca. Defendant was arrested in Manteca when he went out for breakfast the next morning. When Garcia visited defendant in jail and asked where the gun was, defendant said someone had gotten rid of it.³

Gang Evidence

Michael Richards, a detective in the gang unit of the Tracy Police Department, testified for the People as a gang expert.

³ Martinez was charged as an accessory after the fact; he pled guilty and testified under a grant of immunity. Defendant's girlfriend at the time, with whom he spent the night after the shooting, was also charged with being an accessory after the fact and pled to a misdemeanor. She also testified under a grant of immunity.

He testified that South Side Tracy was a subset of the Norteño criminal street gang. There were about 400 Norteños in Tracy and about 50 South Side Tracy Norteños. South Side Tracy Norteños associated with the color red, the number 14, and the "huelga bird," a symbol of the United Farm Workers. The principal activities of South Side Tracy Norteños were murder, assault with a deadly weapon, possession of firearms, sales of narcotics, robberies, carjackings, and theft. To show the gang embraced a pattern of criminal activity, Richards testified about two Norteños in Tracy that had recent gang-related felony convictions.

Richards opined that defendant was an active South Side Tracy Norteño. His opinion was based on defendant's prior contacts with law enforcement, his associating with gang members, his past pattern of activity, his clothing, and his admissions. In addition, defendant had gang tattoos: "south" inside his right forearm and "side" inside his left forearm.

Without objection, Richards described 29 separate contacts between defendant and law enforcement from May 2005 to December 2008. In the first, after a gang-related stabbing, defendant followed witnesses and yelled, "snitch." A few months later, defendant, Martinez, and Garcia were contacted in McDonald Park (a known South Side Tracy Norteño area), after dark in violation of the municipal code. On September 10, 2005, defendant was stopped and ticketed for driving without a license; he was in the company of two known Norteños.

In January 2006, defendant was injured in a large fight occurring at government housing. He was taken to the hospital, but did not cooperate with the investigation. Richards opined that this incident was defendant's being "jumped" into the gang. A few weeks later, defendant was arrested for possession of cocaine base for sale, and was wearing a red T-shirt. In May 2007, defendant was implicated in a vehicle burglary with Martinez.

The remaining contacts involved instances where defendant was in the company of known gang members, wearing clothing associated with the gang (a red shirt, a red bandanna or do-rag, a belt buckle with 14 on it, a black and red sweatshirt, or a sweatshirt with South Side Tracy on it), or the police noted his gang tattoos. In one instance, defendant admitted to police that he was a South Side Tracy Norteño. On another occasion he was found in possession of the Norteño 14 bylaws.

Richards explained that respect was the ultimate issue in gangs. A gang member earned respect by causing fear and intimidation in others. To earn more respect, a gang member needed to intimidate more, like controlling a neighborhood so people would not cooperate with the police. Word spread quickly on the street, and the public often would not cooperate with the police on gang-related crimes.

In response to a direct question, Richards gave his opinion that defendant committed "these felonies for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in any

criminal conduct by gang members.” The basis of his opinion was defendant’s long history of associating with known gang members, wearing clothing indicative of a gang, admitting gang membership, and having gang tattoos. Richards explained that on the night in question defendant met with other gang members at the house of a known gang member. There, he showed Garcia a gun and said it was for any problems that night. At the bar there was a fight; defendant was sucker-punched and quickly escorted out with Garcia and Martinez before he could retaliate. Richards explained that was the ultimate disrespect. In order to maintain status within the gang, show that Norteños will not be intimidated in their own area, demonstrate that he was not weak, and show willingness to use his gun, defendant pulled out the gun and fired multiple times into the occupied bar.

Richards opined, defendant was an active participant in the South Side Tracy subset of the Norteño criminal street gang the night of the shooting.

DISCUSSION

I

Sufficient Evidence of Gang Enhancements

Defendant contends there is insufficient evidence to support the gang enhancements on counts I-VIII. He contends there was insufficient evidence the shooting was for the benefit of, at the direction of, or in association with a criminal street gang, or that he had the specific intent to promote, further, or assist any criminal conduct by gang members.

The amended information alleged an enhancement under Penal Code⁴ section 186.22, subdivision (b)(1) in counts I-VIII: murder (§ 187), six counts of attempted murder (§ 664/187, subd. (a)), and shooting at an occupied building (§ 246). The jury found the enhancements true as to all counts. Except as to count I, murder, which is discussed *post*, the 10-year sentences on the gang enhancements were stayed pursuant to section 654.

Section 186.22, subdivision (b) provides a sentencing enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." "Thus, the trial court can impose the enhancement only if the prosecution establishes both of the following elements beyond a reasonable doubt: first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the *specific intent* to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358.)

Defendant contends his status as a gang member and the commission of particular crimes by members of that gang is insufficient to establish that the crimes were committed for the

⁴ Further undesignated statutory references are to the Penal Code.

benefit of the gang. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [defendant's criminal history and gang affiliations cannot solely support a finding that a crime is gang related under section 186.22].) "Not every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

Defendant argues there was no evidence he committed the crimes to benefit the gang. He contends there was no evidence of gang rivalry that night or that the fight was gang related. There were no gang signs or proclamations; there was no publication that the crimes were to benefit the South Side Tracy Norteños. Defendant contends the expert's opinion that the crimes benefitted the gang was mere surmise and speculation, which does not equal substantial evidence. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 663; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.)

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. [Citation.]" (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.) This standard applies when determining whether the evidence is

sufficient to sustain a jury finding on a gang enhancement.

(*Ibid.*)

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was "committed for the benefit of ... a[] criminal street gang" within the meaning of section 186.22(b)(1). [Citation.]" (*Albillar, supra*, 51 Cal.4th 47, 63.)

Here, the People's expert witness testified that violent crimes increase "respect" for the gang and facilitate its criminal activities by creating fear and intimidating law-abiding neighborhood residents. Murder and assault were primary criminal activities of the South Side Tracy Norteño gang. A reasonable jury could infer, based on this testimony and other evidence in the record, that defendant intended for the shooting to have the predicted effect of intimidating neighborhood residents, "thus facilitating future crimes committed by himself and his fellow gang members." (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353 (*Vazquez*).) "A community cowed by gang intimidation is less likely to report gang crimes and to assist in their prosecution. The gang benefit is plain." (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 110.)

Although there was no evidence that defendant announced or displayed his gang membership while inside Amore's or during the shooting, there was evidence that several of the people in Amore's knew defendant and his status as a gang member. One witness told the police there were "south siders" present that

night. There was also evidence that the shooting, due to its gang-related nature, caused fear and intimidation. During trial, Thomas told a friend of the Bey family that he could not talk about the gun defendant showed him because "these cats" knew where he lived. Manglona testified he was afraid for his children. Although she denied being afraid, Garcia's sister did not want to testify.

There was also substantial evidence that defendant met the second prong of section 186.22, subdivision (b), "the specific intent to promote, further, or assist in any criminal conduct by gang members." The entire night was colored by defendant's gang activities and his adherence to the gang code. The evening began with defendant associating with fellow gang members and showing Garcia the gun he had for protection. His actions indicate he was on the lookout for trouble and ready and willing to use force if it arrived; he announced his willingness and ability to avenge any slight or perceived "disrespect" to the gang. Defendant took exception to the presence of the group from Hayward, making gun gestures to Garcia, and showing Thomas his gun. When the situation escalated, defendant joined in the fight. As Richards explained, when defendant was sucker-punched and ejected without an opportunity to retaliate, he faced the ultimate "disrespect." To preserve his gang status and advance the interest of the South Side Tracy Norteños, he took revenge by shooting indiscriminately into Amore's. From the evidence of defendant's gang membership, his motivation for the crimes to benefit the gang, and his commission of the crimes in the

presence of fellow gang members, the jury could "fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members." (*Vazquez, supra*, 178 Cal.App.4th at p. 354.)

There was substantial evidence to support the gang enhancements.

II

Ineffective Assistance of Counsel:

Failure to Object to Expert Testimony on Ultimate Issue

As recounted *ante*, Detective Richards was asked if defendant committed "these felonies for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in any criminal conduct by gang members?" He responded, "Yes." He then gave the basis of his opinion, citing evidence in the case.

Defendant contends he received ineffective assistance of counsel because trial counsel failed to object to an expert offering an opinion on the ultimate issue. Defendant faults the form of the question to Richards. He contends the direct question improperly asked for the expert's opinion on how the case should be decided. Instead, defendant argues the People were limited to a hypothetical question based on the facts shown by the evidence.

A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under

prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694 [80 L.Ed.2d at p. 698].) Where the claim is based on trial counsel's failure to render an objection, a defendant must prove not only the absence of a reasonable tactical explanation for the omission but also that the motion or objection would have been meritorious. (*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1272.)

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs . . . meets this criterion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

To the extent defendant complains that the expert testimony went to the ultimate issue in the case, his contention lacks

merit. Opinion testimony "that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) While expert testimony on hypothetical facts may lead the jury to believe the conclusions are true, such circumstances "makes the testimony probative, not inadmissible. [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 947.)

In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), at page 1045, our Supreme Court approved the use of hypothetical questions that tracked the evidence, even if only "thinly disguised," as to whether the crime was gang-related activity. The high court did not decide whether it was improper for an expert to testify whether specific defendants acted for a gang reason. (*Vang, supra*, 52 Cal.4th at p. 1048, fn. 4.) The court noted, however, that to the extent such testimony was improper, "the reason for this rule is not that such testimony might embrace the ultimate issue in the case. 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.] Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. 'A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the

ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'" [Citations.]" (*Ibid.*)

Defendant's main contention appears to be that the People failed to pose hypothetical questions to the gang expert. Defendant contends the expert simply gave his opinion as to how the case should be decided--his opinion as to defendant's guilt. But even if we assume without deciding that the *form* of the question was improper, defendant fails to show that counsel provided ineffective assistance by failing to object. Had counsel objected, the People would have reframed the question, reciting the evidence set forth in the expert's answer as the hypothetical facts of the question. The same evidence would have been called to the jury's attention and the same expert opinion that such evidence showed a gang-related crime would have been presented. Since an objection would not have kept the marshalling of evidence in support of the expert's opinion that the crimes were gang related from the jury, trial counsel had a tactical reason not to object.

For the same reason, defendant cannot show prejudice because the result would have been the same with an objection. Defendant's analysis of prejudice is premised on his assertion that there was insufficient evidence to support the gang enhancements. We have rejected that assertion.

III

Ineffective Assistance of Counsel:

Failure to Object to Testimony of 29 Law Enforcement Contacts

Defendant contends he was denied effective assistance of counsel because his trial counsel failed to object to the gang expert's reciting defendant's 29 contacts with law enforcement. In particular, he contends it was ineffective assistance not to object to "inflammatory, speculative and cumulative evidence of uncharged acts and other gang-related activity."⁵

Defendant relies on *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*). In *Williams*, defendant was charged with weapon and drug offenses, active participation in a gang, and gang enhancements. The prosecution introduced evidence of three crimes involving defendant and 15 contacts with law enforcement, some of which involved criminal activity. Some of this evidence was introduced multiple times for different purposes. (*Williams, supra*, 170 Cal.App.4th at pp. 598-599, & fn. 5.)

The appellate court found that although some of this evidence was properly admissible, "it was an abuse of discretion to admit cumulative evidence concerning issues not reasonably subject to dispute. The sheer volume of evidence extended the trial--and the burden on the judicial system and the jurors--

⁵ Defendant had two felony convictions for possession of a controlled substance and six misdemeanors. The trial court ruled none of defendant's priors could be used to impeach him.

beyond reasonable limits, and the endless discussions among the trial court and counsel concerning the admissibility of such evidence amounted to a virtual street brawl." (*Williams, supra*, 170 Cal.App.4th at p. 611.) The court held the error was harmless because the evidence was probative to the gang offense and enhancement; further, it was not likely the jury's passions were inflamed, and the jury acquitted defendant of one gang enhancement and convicted him of a lesser offense on one count, showing the jury did not accept the evidence uncritically. (*Williams, supra*, at pp. 612-613.)

Here, the challenged evidence was directly relevant to and probative of the gang offense and the gang enhancements. Unlike in *Williams*, the evidence was admitted only once and not dwelled upon. The evidence of defendant's 29 prior contacts with law enforcement consumes only 11 pages in a reporter's transcript of over 2400 pages. There is no indication the trial court intended to allow the prosecution the unfettered opportunity to "over-prove their case or put on all the evidence that they have." (*Williams, supra*, 170 Cal.App.4th at p. 610.)

But even if we assume without deciding that the evidence of defendant's gang membership was unnecessarily cumulative, we find no ineffective assistance in counsel's failure to object because the evidence's admission was not prejudicial to defendant. First, the court gave the jury an instruction on the proper, limited use of this evidence--specifically that it was not to be used to show that defendant was of bad character or

had a criminal disposition.⁶ We presume that the jury followed these instructions. (*People v. Williams* (2010) 49 Cal.4th 405, 469.)

Second, the potential for prejudice is decreased where the testimony describing defendant's uncharged acts is no stronger and no more inflammatory than the testimony concerning the charged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) That is the case here. The evidence of possible criminal activity in defendant's contacts with law enforcement was considerably less inflammatory than the evidence at trial of his indiscriminate shooting that killed one person and wounded six others, none of whom had done anything to provoke the shooting. Further, the evidence of these charged crimes was very strong; indeed the evidence of guilt was overwhelming. There was evidence from both of defendant's companions that he was the shooter. Garcia testified directly to that fact. While Martinez declined to identify defendant as the shooter at trial,

⁶ The court instructed the jury: "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related crimes and enhancements charged, or the defendant had a motive to commit the crimes charged, or the defendant acted in the heat of passion. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from the evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

there was evidence that he told others that night that defendant was the shooter.

IV

Error to Impose Gang Enhancement on Murder Count

On count I, the trial court sentenced defendant to 15 years to life for murder, enhanced by 25 years to life for personal use of a firearm causing death under section 12022.53, subdivision (d). The court further enhanced the sentence by 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(C).

Defendant contends the 10-year gang enhancement was imposed in error and must be stricken. The People properly concede the error.

Section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when the felony is a violent felony, as defined by section 667.5, subdivision (c). That provision imposing a 10-year enhancement, however, does not apply where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) In that situation, section 186.22, subdivision (b)(5) applies and imposes a minimum term of 15 years before the defendant may be considered for parole.

In *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), the defendant was convicted of first degree murder, and the jury found true both gang and personal use of firearm enhancements.

He was sentenced to 25 years to life on murder, 25 years to life on the firearm enhancement, and 10 years on the gang enhancement. (*Lopez, supra*, 34 Cal.4th at p. 1005.) On appeal, defendant contended the 10-year enhancement must be stricken because of section 186.22, subdivision (b)(5); he argued that under the plain language of the statute the sentence for first degree murder was a life term. (*Lopez, supra*, at p. 1006.) The People disagreed, arguing subdivision (b)(5) applied only to straight life terms, and not to first or second degree murder. (*Id.* at p. 1007.) Our Supreme Court agreed with defendant, finding that "imprisonment in the state prison for life" included both a straight life term as well as a term of years to life. (*Ibid.*) The high court ordered the sentence modified to delete the 10-year gang enhancement imposed under section 186.22, subdivision (b)(1)(C). (*Id.* at p. 1011.) We shall order the same modification.

V

Error to Impose Gang Enhancement on Count VIII

On count VIII, the court sentenced defendant to 15 years to life for shooting at an occupied building (§ 246), enhanced by 25 years to life for personal use of a firearm causing great bodily injury (§ 12022.53, subd. (d)). An additional 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) was imposed and stayed pursuant to section 654.

Defendant contends the 10-year gang enhancement, although stayed, must be stricken due to the provisions of section

186.22, subdivision (b)(4)(B). The People properly concede the error.

Section 186.22, subdivision (b)(1) sets forth alternative punishments for the gang enhancement, "[e]xcept as provided in paragraphs (4) and (5)." Section 186.22, subdivision (b)(4) is not an enhancement; it "'sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.'" [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6.) Subdivision (b)(4)(B) provides that upon conviction of a felony violation of section 246, "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," the sentence shall be an indeterminate life term with a minimum term of the greater of the term for the underlying conviction (with certain enhancements) or 15 years.

Section 186.22, subdivision (b)(4), not subdivision (b)(1)(C), is applicable if the felony committed to benefit a criminal street gang is a felony violation of section 246. (*People v. Sok* (2010) 181 Cal.App.4th 88, 96 (*Sok*).) The 10-year enhancement of section 186.22, subdivision (b)(1)(C) must be stricken.

VI

Calculation of Sentence on Count VIII

Section 186.22, subdivision (b)(4) provides that a defendant convicted of certain specified felonies where the gang

enhancement is found to be true is to be sentenced "to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term . . . for the underlying conviction, including any enhancement applicable [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a . . . violation of [s]ection 246"

Defendant was sentenced to 40 years to life for shooting at an inhabited dwelling (§ 246), consisting of 15 years to life under section 186.22, subdivision (b)(4)(B) for the substantive crime plus a consecutive term of 25 years to life for the enhancement under section 12022.53, subdivision (d). (As discussed *ante*, the 10-year gang enhancement is ordered stricken.) Defendant argues he should have been sentenced under section 186.22, subdivision (b)(4)(A), which would subject him to a term of 28, 30, or 32 years to life for this crime.

Defendant relies on *People v. Sok, supra*, 181 Cal.App.4th 88. At issue in *Sok* was whether an enhancement term, which was used to *calculate* the minimum sentence under section 186.22, subdivision (b)(4)(A), could be used again to *increase* the sentence. The court held it could not. (*Sok, supra*, at p. 97.) The defendant in *Sok* was convicted of shooting at an occupied car (§ 246) with a firearm use enhancement under section 12022.53, subdivision (d); the defendant also had a prior strike. The court ruled section 186.22, subdivision (b)(4)(A), not subdivision (b)(4)(B), determined the sentence because it was the greater minimum term. (*Id.* at p. 96.) The minimum

term was calculated as three, five, or seven years under section 246 plus 25 years for the enhancement, doubled for the strike. (*Id.* at p. 97.)

That, however, is not how our Supreme Court in *People v. Jones* (2009) 47 Cal.4th 566 (*Jones*), calculated a sentence under 186.22, subdivision (b)(4). In *Jones*, the defendant was convicted of shooting at an inhabited dwelling (§ 246) and the jury found he personally discharged a gun (§ 12022.53, subd. (c)) and acted to benefit a gang (§ 186.22, subd. (b)). At issue was whether he committed a felony punishable by life in prison so as to qualify for the 20-year enhancement under section 12022.53, subdivision (c). The court answered yes. (*Jones, supra*, 47 Cal.4th at p. 569.) In discussing the proper sentence our Supreme Court stated: "By itself, that felony carries a maximum sentence of seven years in prison. But when, as here, the crime is committed to benefit a criminal street gang, the punishment is life imprisonment, with a minimum parole eligibility of 15 years." (*Jones, supra*, at p. 572.) The sentence was further enhanced by 20 years for the gun use enhancement of section 12022.53, subdivision (c). (*Ibid.*) We are, of course, bound by decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The sentence is modified to strike the 10-year gang enhancements under section 186.22, subdivision (b)(1)(C) from counts I and VIII. As modified, the judgment is affirmed. The

trial court is ordered to prepare an amended abstract of judgment showing the modifications to defendant's sentence and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

_____, J.
DUARTE

We concur:

_____, P. J.
RAYE

_____, J.
BLEASE